Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-431

NADINE GODSY,
Appellee,
vs.
SHERMAN M. GODSY, JR.,
Appellant.

APPEAL FROM THE MISSOURI COURT OF APPEALS,
KANSAS CITY DISTRICT

MOTION OF APPELLEE NADINE GODSY TO DISMISS

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APPEAL FROM THE MISSOURI COURT OF APPEALS,
KANSAS CITY DISTRICT

MOTION OF APPELLEE NADINE GODSY TO DISMISS

Appellee Nadine Godsy, pursuant to Rule 16 of the Revised Rules of this Court, moves to dismiss the appeal in the above entitled case on the grounds (a) that the appeal does not present a substantial federal question, (b) that the federal question sought to be raised was not timely or properly raised or expressly passed on by the court below, and (c) the judgment by the court below rests on an adequate non-federal basis.

STATEMENT OF CASE

This case is a divorce action initiated by the appellee in the Circuit Court of Jackson County, Missouri, on July 7, 1971. After nearly one and one-half years of postponement, the case was set for a special hearing on February 15, 1973, at the request of appellant's trial counsel and with the consent of appellee's counsel. The docket notices mailed to both parties by the Circuit Clerk's office mistakenly listed the case under "Motions to Modify"; nonetheless, both counsel for appellant and appellee understood that the hearing was to be a trial on the divorce itself, as set out in the affidavit of appellant's trial counsel filed with the court on February 23, 1973 (Appendix A). The trial record reveals that the appellant's trial counsel had been advised *by the court* that the case would be specially set on February 15, 1973 (Appendix B). On the day of the hearing, appellant's counsel was out of town on vacation and had an office associate appear for him to request a continuance. The continuance was denied and the trial court advised the associate counsel as follows: "You can tell the others what we are going to do. The court will deny the request. I am going to hear it in the absence of the defendant. I don't believe he wants to have it heard. He isn't in good faith at all here. . ." (Appendix B). Thereafter, a hearing on the divorce was held and appellee was granted a divorce, judgment for $110,352.00 in alimony, attorney fees, and suit money, along with child support of $150.00 per week and custody of the minor child (Appendix C).

Appellant timely filed a Motion for New Trial which was overruled on March 16, 1973, by the trial court and appellant thereafter filed an untimely Notice of Appeal to the Missouri Court of Appeals, Kansas City District, but the appeal was dismissed as not being timely filed

(reported at 521 S.W.2d 449). Thereafter, certiorari was denied by the United States Supreme Court at 423 U.S. 887, 96 S.Ct. 181, 46 L.Ed.2d 119 (1975).

On August 5, 1975, appellant filed a Motion to Set Aside Judgment (Appendix D) and the following day appellant, as plaintiff, filed a pleading entitled Petition to Set Aside Judgment and For An Injunction (Appendix E). The Motion and Petition were consolidated for hearing in the trial court, an evidentiary hearing took place and an order was entered sustaining the Motion to Set Aside Judgment (Jurisdictional Statement, Appendix A, p. A1). Thereafter, Respondent filed a timely Notice of Appeal.

On April 5, 1976, the trial court entered an Order Sustaining the Petition to Set Aside Judgment (Jurisdictional Statement, Appendix A, pp. A3-A4) and Respondent thereafter filed a timely Notice of Appeal. The appeals from the Motion and Petition were consolidated, both sides briefed and argued the issues before the Missouri Court of Appeals, Kansas City District and a decision was filed on April 3, 1978 (Jurisdictional Statement, Appendix A, pp. A5-A18).

The Court of Appeals held that the trial court erred in setting aside the default judgment and ordered the judgment reinstated (Jurisdictional Statement, Appendix A, p. A17). Appellant now complains that he was denied due process of law by the trial court entering a default judgment against him without notice, without opportunity to be heard and without the opportunity to be present and to be represented by counsel. Motion for Rehearing and/or Transfer to the Supreme Court of Missouri was made and denied (Jurisdictional Statement, Appendix C, p. A23). Thereafter, appellant's Application for Transfer to the Supreme Court of Missouri was denied on May 1, 1978 (Jurisdictional Statement, Appendix C, p. A29).

ARGUMENT

There Is No Substantial Federal Question Presented

Appellant seeks to invoke the jurisdiction of this Court under 28 U.S.C. §1257 (2), by appeal from the state court, or alternatively, under 28 U.S.C. §1257 (3), by writ of certiorari. In either case the "appeal" must present a substantial federal question, *Cross* v. *Bruning*, 413 F.2d 678 (9th Cir. 1969); 28 U.S.C. §1257 (2) and (3). None is presented here. Briefly stated, the issue raised by appellant is:

> Whether the Circuit Court denied appellant due process by entering a default judgment without sufficient notice and opportunity to be heard.

Appellee does not dispute the factual allegations as presented to this Court by the appellant regarding notice and opportunity to be heard at the trial court. Appellant seeks to claim lack of notice and opportunity to be heard at the divorce trial on the basis of the docket notice which listed this matter for hearing on "Motions to Modify", despite the affidavit of trial counsel for the appellant that acknowledges proper notice of *trial*. Appellant had sufficient notice and opportunity to be heard, but, by and through his counsel, simply failed to take advantage of that opportunity.

None of the cases cited by appellant regarding due process compare even remotely to the facts and circumstances presented here. Appellee concurs with the broad statements quoted by appellant in his Jurisdictional Statement regarding the v[illegible]ue of, and necessity for, notice and opportunity to be heard. In this case however, it was not the lack of procedural safeguards that plagued this appellant; rather it was his own misuse and neglect in

adhering to those procedural safeguards that brings appellant to this Court. Further, the question raised was conclusively settled by this Court in *Godsy* v. *Godsy* (Statement of Case, *supra*, pp. 2-3) wherein certiorari was denied the appellant on the same due process issue now before this Court. In any event, the question so raised by appellant fails to present a substantial federal question.

As will be later discussed, the question which appellant now seeks to raise was not properly raised or passed on by the courts below and the judgment of the courts below rests on an adequate non-federal basis.

I. The Trial Court's Entry of a Default Judgment Against Appellant Did Not Violate the Rights of Appellant Under the Fourteenth Amendment to the United States Constitution in That Appellant Was Not Denied Notice and the Opportunity to Be Heard.

Appellant contends that a substantial federal question was presented because the trial court entered a default judgment without appellant-defendant, or his counsel, being present, and further, that trial counsel was not given notice of the hearing of February 15, 1973. The Court's attention is respectfully directed to the affidavit of trial counsel (Appendix A) wherein he acknowledges notice of a "trial date" on February 15, 1973. In reality, if it were not for a clerical error in listing the case under "Motions to Modify", appellant would be without any excuse whatsoever with respect to notice. Appellant's trial counsel was fully aware of the trial date, and the *true nature* of the proceeding, and the listing error has simply provided appellant with an after-the-fact opportunity to try and salvage what he can. The trial court did not buy this line of argument and a default judgment was properly entered.

Appellant, even though there is no mention of the constitutionality of any state statute or rule in his Jurisdictional Statement, apparently appeals this issue under the auspices of Rule 61.01 of the Missouri Rules of Civil Procedure which authorize the trial court as in this case to strike a party's pleadings and enter a default judgment if that party fails to properly proceed with discovery (Appendix F, pp. 37-39). Appellant alleges no deficiency of Rule 61.01 nor does appellant even bring into issue any statute or rule of the State of Missouri. Assuming *arguendo* that appellant is challenging the constitutionality of Rule 61.01 of the Missouri Rules of Civil Procedure as the complained of action on the part of the trial judge was taken pursuant to this rule, it is obvious after an examination of Rule 61.01 (Appendix F) that the rule exists to provide the trial judge with the authority to take action against a party that, after having ample notice, chooses not to avail himself of his day in court or his opportunity to be heard. A reading of the trial transcript, and particularly the pre-trial conference in chambers with the Honorable Circuit Judge Lewis Clymer, puts the situation in its proper perspective (Appendix B).

Petitioner-appellee had been prejudiced by numerous continuances and delays at least some of which were at the insistence of appellant. Judge Clymer, being aware of these facts, properly exercised his discretion by denying the continuance sought by appellant on the trial date. Rule 65.01 of the Missouri Rules of Civil Procedure (Appendix G) governing continuances provides that the court *may* continue an action until a later date for good cause shown, but the request *must be in writing and by affidavit* unless the adverse party consents (Appendix H). In the instant case, there was no written request, no affidavit and no consent (Appendix B, p. 15). The Missouri Courts have consistently held that "acts of the trial judge

in controlling his docket and the progress of litigation and in the granting or denying of continuances are discretionary." *State ex rel. Schaper* v. *Stassie,* 487 S.W.2d 49 (1972); *Searles* v. *Searles,* 495 S.W.2d 759 (1973); *Krieber* v. *Krieber,* 420 S.W.2d 326 (1967). The fact of the absence of defendant's counsel at the time of trial, in and of itself, does not compel a continuance. *Clinton* v. *Clinton,* 444 S.W.2d 677 (1969); *Carr* v. *Carr,* 308 S.W.2d 357 (1957).

Accordingly, appellee respectfully submits that appellant's allegation presents no substantial federal question at all, as there was, in fact, both notice and an opportunity for him to be heard.

The Questions of Due Process Violations Were Not Properly Raised or Decided by the Courts Below

In his Jurisdictional Statement, appellant attempts to invoke this Court's jurisdiction by alleging a violation of due process by the trial court in entering a default judgment against him without notice, without an opportunity to be heard and without the opportunity to be present and represented by counsel. 28 U.S.C. §1257 (2) provides for appeal jurisdiction to exist from the final judgment of the highest state court

> where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

Appellant raises at no place in his Jurisdictional Statement the constitutionality of any Missouri statute or rule nor does he raise any question of constitutionality whatsoever in his Motion for Rehearing and/or Transfer (Jurisdictional Statement, Appendix C, p. A23) or his Application for Transfer to the Supreme Court of Missouri (Jurisdic-

tional Statement, Appendix C, p. A25). At best, appellant appears, rather, to be challenging the validity of state action, namely the action on the part of the trial court in entering a default judgment, under the auspices of a statute or rule without actually bringing the validiity or constitutionality of any Missouri statute or rule into question. *Zucht* v. *King,* 260 U.S. 174, 43 S.Ct. 24, 67 L.Ed. 194 (1922); *Jett Brothers Distilling Co.* v. *City of Carrollton,* 252 U.S. 1, 40 S.Ct. 255, 64 L.Ed. 421 (1920); *Rohr Aircraft Corp.* v. *County of San Diego,* 362 U.S. 628, 80 S.Ct. 1050, 4 L.Ed.2d 1002 (1960). Because of appellant's failure to properly frame the issue in his Jurisdictional Statement, appeal jurisdiction must fail. As stated by this Court in *Memphis Natural Gas Co.* v. *Beeler,* 315 U.S. 649, 650, 62 S.Ct. 857, 859, 86 L.Ed. 1090 (1942):

> It is not enough that an appellant could have launched his attack upon the validity of the statute itself as applied; if he has failed to do so we are without jurisdiction over the appeal.

As stated above, Rule 61.01 of the Missouri Rules of Civil Procedure, under the aegis of which the challenged action by the trial court took place, is not mentioned, cited, discussed or even alluded to anywhere in the Motion for Rehearing and/or Transfer or the Application for Transfer to the Supreme Court of Missouri. Appellee respectfully suggests that it would be extraordinarily difficult for this Court to accept this appeal in light of the restraints placed on its jurisdiction by 28 U.S.C. §1257.

In *Cardinale* v. *Louisiana,* 394 U.S. 437, 89 S.Ct. 1161, 22 L.Ed.2d 398 (1969), Justice White's opinion for this Court aptly stated both the law and the reasoning that it is suggested should apply to the present case:

> It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions. In *Crowell* v. *Randell,* 10 Pet. 368, 9 L.Ed. 458 (1836), Justice Story reviewed the earlier cases commencing with *Owings* v. *Norwood's Lessee,* 5 Cranch 344, 3 L.Ed. 120 (1809), and came to the conclusion that the Judiciary Act of 1789, c. 20, Sec. 25, 1 Stat. 85, vested this Court with no jurisdiction unless a federal question was raised and decided in the state court below. 'If both of these do not appear on the record, the appellate jurisdiction fails.' The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions both before the *Crowell* opinion [citations], and since . . . [citations omitted].
>
> [T]here are sound reasons for this. Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state ground. Even though States are not free to avoid constitutional issues on inadequate state grounds, *O'Connor* v. *Ohio,* 385 U.S. 92, 87 S.Ct. 252, 17 L.Ed.2d 189 (1966), they should be given first opportunity to consider them.

Additional authority for appellee's position may be found in: *Murdock* v. *City of Memphis,* 20 Wall. 590, 22 L.Ed. 429 (1875); *Bailey* v. *Anderson,* 326 U.S. 203, 66 S.Ct. 66, 90 L.Ed. 3 (1945); *Street* v. *New York,* 394 U.S. 580, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969).

Appellant relies upon the cases of *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U.S. 282, 42 S.Ct. 106 (1921),

and *Fiske* v. *Kansas*, 274 U.S. 380, 47 S.Ct. 655 (1926) to support the appeal jurisdiction of this Court to hear his case. Both of those decisions are distinguishable from the instant case as the constitutionality of the particular state statutes in issue was, in fact, seasonably raised at the first opportunity in the courts below and the state courts decided in favor of the validity of the particular statutes. Further, both of the cases cited by appellant to offer appeal jurisdiction support appellee's view that appellant's appeal should not lie because appellant has failed to focus his attack on the constitutionality of the particular application of statutes or rules by the trial court. Therefore, no substantial federal question is raised.

The Judgment of the Courts Below Rests on an Adequate Non-Federal Basis

Although appellant now seeks to claim a violation of his due process rights by the trial court's entry of a default judgment against him, appellant never availed himself of the procedural safeguards provided by and to the courts of Missouri. The decision of the Missouri Court of Appeals was based not on the merits of the trial court's entry of a default judgment but rather was based on the lack of jurisdiction in the trial court with respect to the motion and petition. It has been held repeatedly by this Court that review is precluded if a state's substantive law is sufficient to support the judgment—no matter how the federal question is resolved, *Murdock* v. *City of Memphis*, *supra*; *Fay* v. *Noia*, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963), or if the state courts have found adequate procedural reasons for refusing to decide the federal question. *Henry* v. *Mississippi*, 379 U.S. 443, 85 S.Ct. 1322, 14 L.Ed.2d 263 (1965). The entry of the default judgment was on February 15, 1973 (Jurisdictional Statement, Appendix A, p. A7) and the motion and petition were filed

on August 5, 1975 and August 6, 1975 respectively. The motion was sustained on February 13, 1976 by the trial court and the Petition to Set Aside Judgment was sustained on April 5, 1976. The Missouri Court of Appeals found that the judgment was beyond the reach of the trial court to alter or vacate due to the great amount of time which had passed. The court below could not and did not examine appellant's contention of a due process violation.

> The allegations in the motion that might be perceived as asserting a meritorious defense or excusable neglect, which factors are considered in that class of cases exemplified by [citations omitted], are not pertinent or controlling here because, as stated, the judgment of February 15, 1973, was a final judgment when the motion was filed in August, 1975, and the trial court was without jurisdiction to alter or vacate that judgment [citations omitted]. (Jurisdictional Statement, Appendix A, p. A12)

The Missouri Court of Appeals then examined appellant's only other avenue to attack the default judgment, namely equity jurisdiction, and determined in a detailed analysis that such jurisdiction likewise must fail (Jurisdictional Statement, Appendix A, pp. A12-A17).

The ruling of the trial court, although discretionary, can no longer be questioned due to the fact of appellant's failure to avail himself of procedural safeguards. The courts below found a lack of compliance on the part of appellant and based their decision accordingly. This Court has often held that it will not substitute its interpretation of state procedure for that of the state courts. *Patterson* v. *Alabama*, 294 U.S. 600, 55 S.Ct. 575, 79 L.Ed. 1082 (1934). Assuming that this Court would decide that a substantial federal question is presented here, then it is

respectfully suggested that the appeal must fail due to the lack of compliance with established state procedure. The federal courts, like the courts of Missouri, restrict the time within which appeal may be taken as well as jurisdiction of the courts to alter or vacate judgments. If it were otherwise, then there could be no finality of judgments, no orderly administration of justice and no "definite point of time when litigation shall be at an end," *Matton Steamboat Co.* v. *Murphy,* 319 U.S. 412, 63 S.Ct. 1126, 87 L.Ed. 1483 (1943).

Appellee respectfully submits, therefore, even if a substantial federal question is found, the lower court's decision rests on an adequate non-federal basis and that the appeal should be dismissed. Further, appellee respectfully suggests that the question presented by appellant was conclusively settled by this Court in *Godsy* v. *Godsy* (Statement of Case, *supra,* pp. 2-3) decided three years ago. At that time this Court found no reasonable grounds to grant certiorari and it is submitted that appellant's question now presented for the second time to this Court has even less merit today. Accordingly, due to the total lack of substance of appellant's position, appellee, pursuant to 28 U.S.C. §2103 asks in addition to dismissal, for this Court to adjudge her reasonable damages for her delay as well as double her costs.

Respectfully submitted,

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APPENDIX

APPENDIX A

Affidavit of Trial Counsel

AFFIDAVIT

STATE OF MISSOURI)
) ss.
COUNTY OF JACKSON)

Robert C. Jones, after first being duly sworn upon his oath, states that he is the attorney of record for the defendant in the above matter and that this cause has been set for hearing on numerous occasions, some of which the defendant was not ready for trial, some of which the plaintiff was not ready for trial and so announced, and some of which both parties were ready for trial but the Court could not hear it because of the large docket of contested cases; that there had been numerous motions and hearings on said motions and that on or about the 10th day of January, 1972, the last time a motion was scheduled, both parties announced that they were ready to hear the motion but that as a result of conferences between the parties, it appeared that the entire matter could be worked out without the necessity of a hearing or trial and that both parties so advised the Court, and that following this time several conferences were held between the attorneys and several written proposals and counter-proposals were exchanged between the attorneys in an effort to resolve the matter; that at some time prior thereto the parties had agreed to a February 15th trial date but that during this period of negotiations and

following the parties' announcement to the Court that they believed the matter could be resolved without trial, the affiant addressed Miss Mary Wren, Domestic Relations Clerk, under date of January 23rd that it appeared the matter could be resolved without trial and to remove it from the docket, and with a tacit understanding of the parties the matter would not be tried this affiant made arrangements to be out of town on February 15th.

That accordingly the matter was removed from the trial docket as a contested divorce for February 15th, but that on said day the attorney for the plaintiff appeared in Court, and although negotiations toward settlement of the matter was still in progress, requested this Court to enter a default judgment against the defendant when he was not in Court and when the affiant, his attorney of record, was out of town and neither parties could present the defense to the plaintiff's action.

The above statement is true to the best of my information, knowledge and belief.

.....

Affiant

Subscribed and sworn to before me this ..... day of February, 1973.

.....

Notary Public

My Commission Expires: .....

APPENDIX B

Transcript of Proceedings in Chambers and Initial Proceedings in Open Court (Feb. 15, 1973)

(Page 6, line 23 through page 14, line 5)

On Thursday, February 15, 1973, the following proceedings were had and entered of record:

(The following proceedings were had IN CHAMBERS and entered of record.)

THE COURT: This is the case of Godsy vs. Godsy?

MR. SIMMS: Yes, Your Honor.

THE COURT: Plaintiff is here by counsel and defendant is appearing by Jack L. Simms.

MR. SIMMS: Your Honor, I am Jack L. Simms, and I am appearing in this matter especially for Mr. Robert C. Jones, attorney of record in this case. It is Mr. Jones' case, I know absolutely nothing about it. It has been pending for quite some time. It was imparted to me that there had been some sort of a settlement that had tentatively been accepted and that motions pertaining to the case were not argued on account of that; that immediately thereafter, Mr. Jones made arrangements to depart on a vacation and will return the first part of the week of the 19th, which I believe is Washington's birthday, and will be ready to try this case at any time thereafter.

I am requesting the Court at this time for a continuance of the case until Mr. Jones can return to handle and properly try the case. Mr. Jones has indicated to me in writing that he is the only one that is qualified, because of the background of the case to try it, and because of my physical condition, having just gotten out of the

Veterans Hospital, with double pneumonia, I am not in condition, nor am I familiar enough with the file to try the case, and I have been so instructed not to try cases by my personal physician. That is the record that I wish to make. We are talking about a matter of a few days. There is background in this case that I am not familiar with and I am requesting that the case be continued to be tried immediately upon return of Mr. Jones, the first part of the week.

MR. KRENSKY: Your Honor, the plaintiff opposes any application for continuance of the trial on the grounds that this case was set down for special hearing chosen by Mr. Jones. It was agreed upon by me at that time.

Mr. Jones stated that the day would be set aside, that there would be no further delay and that the matter would be disposed of at this time.

Previously, there has been six to eight continuances of this case over the past fourteen months. When this case was set, the Court further instructed the defendant to make certain child support payments and alimony payments and to return a car that he had taken that she had been previously using up until the time he took it. Since that time the man has paid nothing, has not returned the car and has told the plaintiff that he doesn't intend to pay anything. She will be an old woman before it is tried.

This very day the plaintiff has a banker under subpoena and the defendant telephoned Mr. Prouty and told him he didn't need to come to court because the matter wouldn't be heard and that he didn't need to worry about Mr. Krensky's subpoena because the matter would never be tried.

The settlement was a tentative settlement that was offered by the plaintiff and accepted by the defendant.

Subsequently three weeks afterwards the defendant had not acted upon it and at that time Mr. Jones and I had a discussion as to when he would act upon it and I was informed that it had fallen through even though it had been agreed upon.

Mr. Jones called Mary Wren and told her it was settled and to take it off the docket. I advised this court that the matter was not settled and should be left on the docket and sent a strongly worded letter to Mr. Jones to that effect.

We have made further attempts to get child support but there was no success and we have had no success in getting the automobile returned.

Last Thursday I received a letter from Mr. Jones stating he hoped I would not object to a continuance, that he was going on his winter vacation to Hawaii and I wrote him a letter and hand carried it to the office and it was placed in Mr. Jones' hands. He read it and made no comment and my letter said that I did not understand and opposed a continuance and that I would appear in court ready to try the matter and would urge the Court to allow us to try the matter.

I talked to Gene McDaniel on Monday and was informed by him that Mr. Jones had left town and I told Gene we would be here prepared to try the case.

This is not a statutory ground to continue a case because a lawyer is on vacation and from a personal standpoint I would not oppose a continuance for such reason had this matter not been delayed so many times in the past and I don't know when the plans materialized to take this vacation. The letter Mr. Jones sent me saying he was going on vacation was dated the 2nd and mailed on the 7th of February and I asked him about it; that we may have been able to advance the case up a week

and Mr. Jones said, "Well, that is the way it happens in this office. Things don't get mailed out promptly."

The plaintiff is suffering from want of money. She has received second and third notice of utilities being shut off, she is without a car, she owes the bank, the baby-sitter, she has borrowed money to live on. This matter will not get any better until it is tried.

MR. SIMMS: For the record, may I ask you a question based upon what we have talked about heretofore, and for my own self-satisfaction, had it been myself who requested this continuance and told you it would be tried the first part of next week, would you oppose that?

MR. KRENSKY: No.

MR. SIMMS: I believe that is all I have for the record, Your Honor.

THE COURT: What was your offer again?

MR. SIMMS: I asked him if it had been myself who requested the continuance and that it would be tried the first part of next week, would he oppose the continuance, and he said, "No."

MR. KRENSKY: I would take Jack's word if he said he would try this case next week or next month.

THE COURT: Gentlemen, the Court feels this matter should be tried. The record does reflect that it has been continued a number of times at the request of both parties. The case came from Independence on the 5th of December. The Court recalls the conference in chambers with the attorneys and at the bench where both the plaintiff and defendant were present and it was my understanding the defendant would bring up to date his child support payments, which at that time amounted to something like $1500.00. The order was made in court 1/29/72. He has not yet done it and he also promised he would share

some of these automobiles. He seems to me to be in contempt of the court. I think we should go ahead with the case if Mr. Krensky is demanding that it be heard today.

I am not blaming you, Mr. Simms. You can tell the others what we are going to do.

The Court will deny the request. I am going to hear it in the absence of the defendant. I don't believe he wants to have it heard. He isn't in good faith at all here and, as I understand it, the fellow is in a position to pay.

Mr. Hunsucker, there is a motion for your fees isn't there?

MR. HUNSUCKER: Yes, Your Honor, the temporary allowances was heard before Judge Randall and he made the child support and alimony allowances.

MR. SIMMS: Very well. Thank you, Your Honor.

BE IT REMEMBERED that heretofore on Thursday, February 15, 1973, the above cause came on regularly for hearing before the Honorable LEWIS W. CLYMER, Judge of Division No. 8 of the Circuit Court of Jackson County, Missouri, sitting as Division "B" of Domestic Relations.

The Plaintiff appeared in person and was represented by her attorney, Mr. Frank Krensky.

WHEREUPON, the following proceedings were had and entered of record:

THE COURT: This is the case of Godsy vs. Godsy, and the Court heretofore has allowed a record to be made in chambers at which time Mr. Jack Simms appeared on behalf of Mr. Jones, who is counsel of record for the defendant, and at that time requested a continuance. The

file reflects, of course, that Mr. Jones is not in the city and a letter is in here from him where he says he will be away and couldn't be here and that he is under the impression that a settlement would be reached.

On the other hand, Mr. Krensky says that is not so. The Court is not satisfied with the handling of this. It was set especially at this time at the agreement of both counsel and I expected him to be here. We excused Mr. Simms because of his illness and his unfamiliarity with the case and the request has been denied and the Court will proceed with hearing this case with the defendant not being present nor counsel being present.

MR. KRENSKY: Your Honor, at this time, there are some preliminary motions pending before the Court, can we dispose of them at this time?

THE COURT: All right.

APPENDIX C

IN THE
CIRCUIT COURT OF JACKSON COUNTY, MISSOURI

NADINE GODSY,
Plaintiff,

vs.

SHERMAN M. GODSY, JR.,
Defendant.

Juvenile & Domestic Relations
Division No. 8

Circuit Court No. 749,413

Judgment Entry and Decree of Divorce

Comes now on this 15th day of February, 1973, the plaintiff by and through her attorneys, Frank S. Krenzky and James R. Hunsucker and the defendant by his attorneys, Jones & McDaniel, and Jack Sims, appearing before the Court and the Defendant by his attorney requested a continuance in the above styled matter. After an oral hearing in which the defendant by his attorney and the Plaintiff by her attorneys were heard, the Court refused to grant a continuance and ordered this matter for trial.

This cause having come on for a hearing and being submitted to the Court, and all evidence heard and being advised the premises, the Court disposed of preliminary motions now pending in this matter.

1. The motion of James R. Hunsucker, for attorney's fees was sustained by the evidence introduced. James R. Hunsucker was granted an attorney's fee in the amount of $4,320.00.

2. Defendant's motion to cite Plaintiff for contempt was denied and Defendant's Motion to Modify Custody also denied.

3. Motion for Contempt against the Defendant filed by the Plaintiff is considered moot and dismissed.

4. Plaintiff's Motion for Additional Temporary Alimony and Child Support is considered moot and dismissed.

5. Plaintiff's Motion to Strike Defendant's Pleading is sustained.

Evidence was heard on the Plaintiff's petition for a decree of Divorce and the Court after hearing the evidence and being satisfied that the Plaintiff was the innocent and injured party and was entitled to the relief prayed for in plaintiff's petition. ORDERS, ADJUDGES AND DECREES that plaintiff be and hereby is absolutely and forever divorced from the bonds of matrimony existing between the Plaintiff and Defendant. That plaintiff be awarded the care, control and custody of Gary S. Godsy, age (7) years the minor child born of the marriage. That the defendant is ordered to pay child support in behalf of the said minor child to the plaintiff in the sum of $150.00 per week; that the Defendant is ordered to pay the Plaintiff the sum of $100,000.00 alimony in gross; that the plaintiff is awarded attorney's fees in the amount of $5,-932.00 payable by the defendant; that the plaintiff is awarded suit money in the amount of $100.00 payable by the defendant. The defendant is granted privilege of reasonable visitation with Gary S. Godsy, the minor child of the marriage.

That costs be taxed against the defendant and execution shall issue therefor.

Dated this 15th day of February, 1973.

/s/ Lewis W. Clymer
Circuit Court Judge

APPENDIX D

IN THE CIRCUIT COURT OF MISSOURI,
SIXTEENTH JUDICIAL CIRCUIT

No. 749,413

NADINE GODSY,
Plaintiff,

vs.

SHERMAN M. GODSY, JR.,
Defendant.

Motion to Set Aside Judgment

COMES NOW Defendant, Sherman Godsy, Jr., by and through his attorneys, and for his Motion to Set Aside Judgment, alleges and states as follows:

1. That this motion is made pursuant to Rule 74.32 of the Rules of Civil Procedure, Supreme Court of Missouri. It is also made as a motion in the nature of coram nobis. It is also made to set aside the Judgment for fraud. Consideration is also asked of the Court by this motion under Rule 74.78, Rules of Civil Procedure, Supreme Court of Missouri.

2. That on or about February 15, 1973, this Court entered a purported Default Judgment against defendant. A copy of such Judgment Entry is marked Exhibit "A" and attached to this motion.

3. That this motion is made within three (3) years from the date the entry of purported Judgment was made.

4. That Rule 74.32 of the Missouri Rules of Civil Procedure permits the setting aside of any purported judg-

ment for irregularity within three (3) years after the rendition thereof, including but not limited to default judgments.

5. That through reference to the record of the trial and hearing of this cause and upon the face of the record, it appears that such purported Judgment was not made through timely and regular procedure, same being violations or misapplications of established rules of procedure, from want of adherence to prescribed rules and modes of proceeding, consisting of omitting to do something that is necessary for the due and orderly conduct of a suit or the doing of some act at an unreasonable time or in an improper manner.

6. That there was notice to defendant's counsel made by the Clerk of the Circuit Court of Jackson County, at the direction of plaintiff's counsel, that there was to be a "hearing" upon a "Motion to Modify" in this case on February 15, 1973. That there was on file in this matter plaintiff's motions for "Additional Temporary Alimony and Child Support" and Motion for Additional Temporary Attorney's Fees and Suit Money and Costs, which are motions to modify a previous order of this Court. *That, there were no other motions noticed up by plaintiff or the Circuit Clerk as appears from the face of the record. That, plaintiff's counsel as appears in the record of this case by letter* notified defendant's counsel that "Motions" were to be heard on the date for hearing.

7. That there was no notice of the entry of the Order and Judgment of this case as provided by Rule 74.78, Rules of Civil Procedure.

8. That the Judgment Entry and Transcript of this cause shows that no notice was ever given to defendant or his counsel.

9. That this Honorable Court exceeded its jurisdiction in rendering a default judgment against defendant; while plaintiff had noticed up motions to modify for February 15, 1973 and had such motions to modify on file, there was no notice to take up plaintiff's motion to strike pleadings filed with the Court on September 13, 1972. Moreover, plaintiff's motion to strike pleadings does not ask the Court to enter a default judgment against defendant as was done in this case. Moreover, the grounds stated in the Motion to Strike Pleadings were moot, and no amended pleadings were filed to reflect the grounds for such motion as testified to by plaintiff in the hearing held on February 15, 1973; that any purported "notice" of hearing on such motions was not in sufficient form to apprise defendant of what was to be heard on February 15, 1973.

10. That the failure to give adequate notice to defendant violated his rights under the due process clause of the Fourteenth Amendment to the United States Constitution and of Article I, Section 10 of the Missouri Constitution, which provide that no person shall be deprived of life, liberty or property without due process of law.

11. That there was no competent or adequate evidence before the Court on February 15, 1973 to permit the entry of the judgment against defendant, and no competent or adequate evidence to deny defendant's purported counsel's continuance.

12. That there is and was evidence outside the record of this cause to show the Court it should set aside the judgment of this cause, including records of the Office of Circuit Clerk, Jackson County, Missouri, showing no notice of a hearing on a default divorce or otherwise to permit the entry of the judgment herein was given to defendant or his purported attorney.

13. That there was in effect fraud in procuring such judgment in that defendant and his counsel were given to understand by plaintiff's counsel that there would be no hearing, that the matter was settled; that there was a settlement entered into by plaintiff and defendant which defendant was performing and intended to perform but which was willingly and intentionally violated by plaintiff and her counsel by having a hearing and by not adhering to the settlement agreement; that there were false representations made by plaintiff and her attorney to the effect that only motions to modify would be heard on February 15, 1973.

14. That as the record reflects, defendant had no attorney present at the hearing, was not afforded the right to be present with his attorney, all in violation of the Sixth and Fourteenth Amendments to the United States Constitution and of Article I, Section 10 and Article I, Section 14 of the Missouri Constitution, providing for Courts to be open to every person, and Article I, Section 18(a) in that plaintiff was in effect charging defendant with a crime.

15. That defendant was told by his counsel not to appear, thus did not appear for that reason, and is thus free from personal fault or negligence in connection with the entry of the judgment.

16. That there was a failure by defendant's counsel to properly represent defendant before the Court and that this constituted a fraud in the procurement of the judgment.

17. That the judgment was procured as the result of unavoidable accident or excusable mistake by defendant and the only reason he did not appear was because of the advice of counsel; that it was due to the inattention, lack of preparation, and lack of proper instruction and advice that defendant did not appear.

18. That there is no adequate remedy at law.

19. That defendant has a meritorious defense on all issues in this cause in that plaintiff has committed adultery with other men, is not the innocent party, is not a fit and proper person to have custody of the minor child born of the marriage; and further that:

(a) plaintiff was nagging and quarrelsome toward the defendant;

(b) plaintiff was naturally jealous of the defendant without justification or reason;

(c) plaintiff struck the defendant and threatened on numerous occasions to kill him;

(d) plaintiff was a spendthrift and not responsible in the handling of money;

(e) plaintiff was away from home for unexplained periods of time and associated improperly with other men;

(f) plaintiff drank alcoholic beverages in excess and was addicted to the use of drugs and narcotics;

(g) plaintiff on numerous occasions during the marriage took drugs in excess and threatened to kill herself and left numerous suicide notes and refused medical and psychiatric care sought to be given her by the defendant.

Respectfully submitted,

/s/ James R. Wyrsch
Henry H. Fox, Jr. and
James R. Wyrsch
1050 Home Savings Building
1006 Grand Avenue
Kansas City, Missouri 64106
Attorneys for Defendant

The undersigned certifies that a copy of the above and foregoing was delivered on this 5th day of August, 1975, to: THAINE Q. BLUMER, 2010 Traders National Bank Building, Kansas City, Missouri 64106, Attorney for Plaintiff.

/s/ James R. Wyrsch
Attorney for Defendant

STATE OF MISSOURI)
) ss.
COUNTY OF JACKSON)

Sherman M. Godsy, Jr., Defendant herein, being first duly sworn on his oath, states that he has read the above and foregoing Motion to Set Aside Judgment, and that the facts contained therein are true and correct to the best of his knowledge and belief.

/s/ Sherman M. Godsy Jr.
Sherman M. Godsy, Jr.

Subscribed and sworn to before me this 5th day of August, 1975.

/s/ Charles B. Kaplar
(Seal) Notary Public

My commission expires: 12/3/77.

APPENDIX E

IN THE
CIRCUIT COURT OF MISSOURI
SIXTEENTH JUDICIAL CIRCUIT

No. DR75-4195

SHERMAN GODSY, JR.
Plaintiff,

vs.

NADINE GODSY,
Defendant.

Petition to Set Aside Judgment and for an Injunction

(Filed August 6, 1975)

COMES NOW Plaintiff, Sherman Godsy, Jr., by and through his attorneys, and for his Petition to Set Aside Judgment and for an Injunction, alleges and states as follows:

1. That on or about February 15, 1973, this Court entered a purported Default Judgment against plaintiff herein, defendant in Cause No. 749,413. A copy of such Judgment Entry is marked Exhibit "A" and attached to this motion.

2. That Rule 74.32 of the Missouri Rules of Civil Procedure permits the setting aside of any purported judgment for irregularity within three (3) years after the rendition thereof, including but not limited to default judgments.

3. That through reference to the record of the trial and hearing of said Cause No. 749,413 and upon the face

of the record, it appears that such purported Judgment was not made through timely and regular procedure, same being violations or misapplications of established rules of procedure, from want of adherence to prescribed rules and modes of proceeding, consisting of omitting to do something that is necessary for the due and orderly conduct of a suit or the doing of some act at an unreasonable time or in an improper manner.

4. That in said cause, there was notice to defendant's counsel made by the Clerk of the Circuit Court of Jackson County, at the direction of plaintiff's counsel, that there was to be a "hearing" upon a "Motion to Modify" in said cause on February 15, 1973. That there was on file in the matter plaintiff's motions for "Additional Temporary Alimony and Child Support" and Motion for Additional Temporary Attorney's Fees and Suit Money and Costs, which are motions to modify a previous order of this Court. *That, there were no other motions noticed up by plaintiff or the Circuit Clerk as appears from the face of the record. That, plaintiff's counsel as appears in the record of the case by letter* notified defendant's counsel that "Motions" were to be heard on the date for hearing.

5. That there was no notice of the entry of the Order and Judgment of said cause as provided by Rule 74.78, Rules of Civil Procedure.

6. That the Judgment Entry and Transcript of said cause shows that no notice was ever given to defendant (plaintiff herein) or his counsel in said cause.

7. That this Honorable Court exceeded its jurisdiction in rendering a default judgment in said cause against defendant (plaintiff herein); while plaintiff (defendant herein) had noticed up motions to modify for February 15, 1973

and had such motions to modify on file, there was no notice to take up plaintiff's motion to strike pleadings filed with the Court on September 13, 1972. Moreover, plaintiff's motion to strike pleadings does not ask the Court to enter a default judgment against defendant (plaintiff herein) as was done in this case. Moreover, the grounds stated in the Motion to Strike Pleadings were moot, and no amended pleadings were filed to reflect the grounds for such motion as testified to by plaintiff (defendant herein) in the hearing held on February 15, 1973; that any purported "notice" of hearing on such motions was not in sufficient form to apprise defendant (plaintiff herein) of what was to be heard on February 15, 1973.

8. That the failure to give adequate notice to the defendant in said cause (plaintiff herein) violated his rights under the due process clause of the Fourteenth Amendment to the United States Constitution and of Article I, Section 10 of the Missouri Constitution, which provide that no person shall be deprived of life, liberty or property without due process of law.

9. That there was no competent or adequate evidence before the Court on February 15, 1973 to permit the entry of the judgment against the defendant in that action (plaintiff herein), and no competent or adequate evidence to deny defendant's purported counsel's continuance in said cause.

10. That there is and was evidence outside the record of said cause to show the Court it should set aside the judgment of said Cause No. 749,413, including records of the Office of Circuit Clerk, Jackson County, Missouri, showing no notice of a hearing on a default divorce or otherwise to permit the entry of the judgment herein was given to defendant in said cause (plaintiff herein) or his purported attorney.

11. That there was in effect fraud in procuring such judgment in that defendant (plaintiff herein) and his counsel were given to understand by plaintiff's (defendant herein) counsel that there would be no hearing, that the matter was settled; that there was a settlement entered into by plaintiff and defendant which defendant (plaintiff herein) was performing and intended to perform but which was willingly and intentionally violated by plaintiff (defendant herein) and her counsel by having a hearing and by not adhering to the settlement agreement; that there were false representations made by plaintiff (defendant herein) and her attorney to the effect that only motions to modify would be heard on February 15, 1973.

12. That as the record reflects, defendant (plaintiff herein) had no attorney present at the hearing, was not afforded the right to be present with his attorney, all in violation of the Sixth and Fourteenth Amendments to the United States Constitution and of Article I, Section 10 and Article I, Section 14 of the Missouri Constitution, providing for Courts to be open to every person, and Article I, Section 18(a) in that plaintiff (defendant herein) was in effect charging defendant (plaintiff herein) with a crime.

13. That defendant (plaintiff herein) was told by his counsel not to appear, thus did not appear for that reason, and is thus free from personal fault or negligence in connection with the entry of the judgment.

14. That there was a failure by defendant's (plaintiff herein) counsel to properly represent defendant (plaintiff herein) before the Court and that this constituted a fraud in the procurement of the judgment.

15. That the judgment was procured as the result of unavoidable accident or excusable mistake by defendant

(plaintiff herein) and the only reason he did not appear was because of the advice of counsel; that it was due to the inattention, lack of preparation, and lack of proper instruction and advice that defendant (plaintiff herein) did not appear.

16. That there is no adequate remedy at law.

17. That plaintiff has a meritorious defense on all issues in this cause in that defendant has committed adultery with other men, is not the innocent party, is not a fit and proper person to have custody of the minor child born of the marriage; and further that:

(a) defendant was nagging and quarrelsome toward the plaintiff;

(b) defendant was naturally jealous of the plaintiff without justification or reason;

(c) defendant struck the plaintiff and threatened on numerous occasions to kill him;

(d) defendant was a spendthrift and not responsible in the handling of money;

(e) defendant was away from home for unexplained periods of time and associated improperly with other men;

(f) defendant drank alcoholic beverages in excess and was addicted to the use of drugs and narcotics;

(g) defendant on numerous occasions during the marriage took drugs in excess and threatened to kill herself and left numerous suicide notes and refused medical and psychiatric care sought to be given her by the plaintiff.

18. That defendant has caused various attachments, levies, executions and sales of plaintiff's property in which he has an interest, including but not limited to the following described real estate:

Real estate situated in Jackson County, Missouri, described as follows: The Southwest 1/4 of the Northwest 1/4 of Section 33, Township 49, Range 31, EXCEPT THE West 260 feet thereof,

Part of Sections 32 and 33, Township 49, Range 31, described as follows: Beginning at the Northeast corner of the Northwest 1/4 of the Northwest 1/4 of Section 33, Township 49, Range 31; thence South 1314 feet to the Southeast corner thereof; thence West 1059.14 feet to a point 260 feet East of the Southwest corner of said 1/4 1/4 section; thence North parallel to the West line of said 1/4 1/4 section, 295 feet; thence West parallel to the South line of said 1/4 1/4 section and its prolongation thereof, 454.3 feet to a point on the East line of Fairview Road (40 feet from the centerline thereof), thence in a Northeasterly direction along the East line of said right of way and along a curve to the right (having a radius of 419.28 feet) 283.00 feet to the point of tangent; thence North 40 degrees 25 feet East along said right of way 82.84 feet to the point of curve; thence in a Northeasterly direction along the East line of said right of way and along a curve to the left (having a radius of 481.68 feet) 191.11 feet; thence East 194.48 feet to a point on the Northerly line of the Old County Road (25 feet from the center line thereof); thence along the Northerly line of said right of way as follows: Southeasterly along a curve to the left (having a radius of 290.7 feet) 17.59 feet to the point of tangent; thence South 64 degrees 41 feet East

109.43 feet to the point of curve; thence Southeasterly along a curve to the left (having a radius of 226.04 feet) 69.56 feet to the point of tangent; thence South 82 degrees 19 feet East 79.94 feet to the point of the curve; thence Easterly along a curve to the left (having a radius of 300.7 feet) 81.35 feet to the point of tangent; thence North 82 degrees 11 feet East 64.59 feet to the point of curve; thence Northeasterly along a curve to the left (having a radius of 138.46 feet) 60.64 feet to the point of tangent; thence North 57 degrees 05 feet East, 169.64 feet to the point of curve; thence Northeasterly along a curve to the left (having a radius of 2832.10 feet) 24.16 feet; thence North parallel to the East line of said 1/4 1/4 section, 480.8 feet; thence East along the North line of said 1/4 1/4 section 450 feet to the point of beginning, Jackson County, Missouri.

19. That said sale is now set for August 8, 1975, at 2:00 P.M.

20. That although said property lies within the Independence jurisdiction of the Court, and defendant intends to sell it in Independence, the publication as stated only relates to downtown Jackson County.

WHEREFORE, the premises considered, plaintiff respectfully prays that the Court issue its order setting aside the Judgment and holding it for naught, that this Honorable Court issue a temporary restraining order against any further attachments, levies, sales or garnishments, that this Court issue a permanent injunction against any further attachments, levies, sales or garnishments, that defendant be enjoined and restrained from conveying the aforementioned real estate until some further order be made in the premises by this Court, and for such other and

further relief as may be just and equitable, including the costs of this action.

Respectfully submitted,

/s/ James R. Wyrsch
Henry H. Fox, Jr. and
James R. Wyrsch
1050 Home Savings Building
Kansas City, Missouri 64106
Attorneys for Plaintiff

STATE OF MISSOURI)
) ss.
COUNTY OF JACKSON)

SHERMAN M. GODSY, JR., plaintiff herein, being first duly sworn on his oath, states that he has read the above and foregoing Petition to Set Aside Judgment and for an Injunction, and that the facts contained therein are true and correct to the best of his knowledge and belief.

/s/ Sherman M. Godsy, Jr.
Sherman M. Godsy, Jr.

Subscribed and sworn to before me this 5th day of August, 1975.

/s/ Joyce Meredith
Notary Public

My commission expires: 3/28/79.

APPENDIX F

Rule 61.01, Rules of Civil Procedure, Supreme Court of Missouri

RULE 61. ENFORCEMENT OF DISCOVERY BY PARTIES

61.01 Motion for Order Compelling Discovery

(a) Motion to Compel Answer—Costs of. Upon the refusal of a party to answer any interrogatory submitted under Rule 56, the proponent of the question may move the court, on reasonable notice to all persons affected thereby, for an order compelling an answer. If the motion is granted and if the court finds that the refusal was without substantial justification, the court shall require the refusing party to pay to the examining party the amount of the court costs incurred in obtaining the order. If the motion is denied and if the court finds that the motion was made without substantial justification, the court shall require the examining party to pay to the refusing party the amount of the court costs incurred in opposing the motion.

(b) Refusal to Obey—Consequences of. If any party, or if an officer, director, general manager, managing agent or partner thereof refuses to obey any order made under paragraph (a) of this Rule requiring him to answer designated questions, or an order made under Rule 58 to produce any document or other thing for inspection, copying or photographing, or to permit it to be done, or to permit entry upon land or other property, or an order made under Rule 60, requiring him to submit to a physical or mental examination, the court may make such orders

in regard to the refusal as are just, and among others the following:

(1) An order that the matters regarding which the questions were asked or the character or description of the thing or land, or the contents of the paper, or the physical or mental condition of the party or any other designated facts shall be taken to be established for the purpose of the action in accordance with the claim of the party obtaining the order;

(2) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing in evidence designated documents or things or items of testimony, or from introducing evidence of physical or mental condition;

(3) An order striking out pleadings or parts thereof, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.

(c) Refusal to Make Admission—Consequences of. If a party, after being served with a request under Rule 59 to admit the genuineness of any relevant documents or the truth of any relevant and material matters of fact, files and serves a written sworn denial thereof and if the party requesting the admissions thereafter proves the genuineness of any such document or the truth of any such matter of fact, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making such proof. Unless the court finds that there were good reasons for the denial or that the admissions sought were of no substantial importance, the order shall be made.

(d) Willful Failure to Appear—Consequences of. If a party, or if the party served is a public or private corporation, a partnership or other unincorporated association, an officer, director, general manager or managing agent or partner thereof, willfully fails to appear before the officer who is to take his deposition, after being served with a proper notice, or fails to return answers to interrogatories submitted under Rule 56, after proper service of such interrogatories, the court on motion and notice may strike out all or part of any pleading of that party, or dismiss the action or proceeding or any part thereof, or enter a judgment by default against that party.

(Amended March 6, 1962, eff. Oct. 1, 1962.)

APPENDIX G

Rule 65.03, Missouri Rules of Civil Procedure

65.03 Application for Continuance, How Made

An application for a continuance shall be made by a written motion accompanied by the affidavit of the applicant or some other credible person setting forth the facts upon which the application is based, unless the adverse party consents that the application for continuance may be made orally.

APPENDIX H

Rule 65.01, Missouri Rules of Civil Procedure

65.01 Court May Continue a Civil Action to a Fixed Day

For good cause shown, the court may continue a civil action to a fixed day, or to a date for trial to be set thereafter. Every continuance granted on the application of a party may be at the cost of such party, if so ordered by the court.